Update on the Federal Rules: Recent Amendments and Proposed Rule Changes

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Rule Changes

- ***Topic #1:*** Results of the last rule amendment cycle, which ended in December 2015
- ***Topic #2:*** Proposed rule changes scheduled for December 2016
- ***Topic #3:*** Proposed rule changes scheduled for December 2017

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Rule Changes Adopted in December 2015

- No changes made in the Rules of Evidence
- But an extensive set of changes were made in the Federal Rules of Civil Procedure
  - First circulated in August 2013, and substantially revised in May 2014 after the public comment period
  - Approved by the Supreme Court last April
  - Effective December 1, 2015

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Case Management Amendments

- ***Rule 4(m):*** The deadline for serving a complaint was reduced from 120 days to 90 days
- ***Rule 16(b)(2):*** Absent good cause, a scheduling order must be issued by the earlier of 90 days after any defendant is served or 60 days after any defendant appears (rather than 120 days after a defendant's service or 90 days after a defendant's appearance)

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Case Management Amendments, cont.

- ***Rule 16(b):*** If a Rule 16 conference is held, it must either be in person or by telephone (the parties and the court are required to actually confer)
- ***Rules 16(b)(3) & 26(f):*** Two new topics for scheduling conferences & discovery meetings:
  - Agreements on evidence preservation
  - Agreements on privilege non-waiver

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Case Management Amendments, cont.

- ***Rule 16(b)(3):*** Permits courts to require parties to confer with the court before filing a discovery motion
- ***Rule 26(d)(1):*** Parties may submit a document request before the Rule 26(f) meeting
  - But service is not effective until the date of the meeting

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Proportionality Amendments

- ***Rule 26(b)(1)*** amended to say that discovery ***must*** be:
  - "proportional to the needs of the case considering [1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefit"
  - All but factor [3] were formerly listed in Rule 26(b)(2)

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Proportionality Amendments, cont.

- ***Rule 26(b)(1)*** formerly provided that "[r]elevant information need not be admissible at the trial if the discovery appears *reasonably calculated to lead to the discovery of* admissible evidence"
- It was amended to say "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable"
- "Relevance" defines the scope of discovery, not the "reasonably calculated" language

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Proportionality Amendments, cont.

- ***Rule 26(b)(1)*** formerly allowed a court to broaden the scope of discovery to encompass the "subject matter" of the action, and not just the parties' claims and defenses
- That language was deleted from the rule to focus discovery just on "claims and defenses"

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Proportionality Amendments, cont.

- ***Rule 26(b)(1)*** formerly listed examples of permissible discovery
  - "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter"
- As no one disputes that it is proper to take discovery on these subjects, this clause was deleted because it was unnecessary

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Proportionality Amendments, cont.

- ***Rule 26(c)(1)(B)*** was amended to explicitly provide that a court has the authority to enter a protective order that allocates the costs of discovery
- Courts currently recognize that they have the power to shift the cost of discovery to the requesting party, but putting that authority in the rule may encourage courts to exercise it
- A comment was added, however, saying that cost-shifting should not be the norm

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Proportionality Amendments, cont.

- Originally, changes were proposed to impose limits on Rules 30, 31, 33 and 36:
  - ***Rules 30 & 31:*** Only 5 depositions per side rather than 10, limited to 6 hours per deposition
  - ***Rule 33:*** Only 15 interrogatories rather than 25
  - ***Rule 36:*** Only 25 RFAs allowed
- All those proposals were ***withdrawn*** in May 2014

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Proportionality Amendments, cont.

- ***Rule 34*** amendments:
  - Objections must be stated with specificity
  - Response must disclose whether documents are being withheld on the basis of an objection
  - If a party elects to produce documents rather than merely allow inspection, that party must produce the documents by the requested inspection date or state when the production will be complete

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Cooperation

- ***Rule 1*** was amended to make it clear that parties have an obligation to promote the Rule's objectives:
  - "[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

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Amendment to Rule 37(e) Background

- Adopted in 2006, former Rule 37(e) was intended to provide a safe harbor against sanctions for the inadvertent loss of electronically stored data
- The rule provided:
  - "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

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Amendment to Rule 37(e) Criticism of the Former Rule

- Its focus was too narrow in dealing only with electronically stored information
- The rule didn't resolve the split in the federal courts about whether sanctions require willful misconduct or can be awarded for mere negligence
- The rule didn't even provide the protection it was intended to afford for the inadvertent loss of electronically stored information

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Amendment to Rule 37(e) August 2013 Proposal

- In August 2013, the Civil Rules Advisory Committee circulated a substantially reworked rule replacing the existing rule entirely
- Applied not only to electronically stored information, but all types of evidence
- Adopted the position that a party may not be sanctioned for the loss of evidence if it resulted merely from the party's negligence

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Amendment to Rule 37(e) June 2014--Starting Over

- The August 2013 proposal was widely criticized as too complex, too vague, and too focused on sanctions
- In May 2014, the Advisory Committee came up with a completely different proposal
  - Unlike the prior proposal, it applied only to the loss of electronically stored information
  - Like the prior proposal, a party would not be sanctioned if the loss of information results from negligence rather than intentional conduct

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Amendment to Rule 37(e) Overview

- The amended rule replaces the existing rule and consists of three components:
  - An introductory clause setting forth when the rule applies;
  - A clause dealing with a non-intentional loss of ESI that causes prejudice; and
  - A clause dealing with an intentional loss of ESI

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Amendment to Rule 37(e) #1: When the Rule Applies

- The rule applies if electronically stored information "that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it" ***and***
- "[I]t cannot be restored or replaced through additional discovery"

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Amendment to Rule 37(e) #1: Key Points

- The rule does not require a prior court order requiring evidence preservation
- Perfection is not required, only reasonable steps
- The rule says it does not create a duty to preserve, but the Advisory Note says a duty arises if "litigation is reasonably foreseeable"
- The rule does not come into play if the loss results from an Act of God

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Amendment to Rule 37(e) #2: Non-intentional Losses of ESI

- If the rule applies, then "upon finding prejudice to another party from loss of the information, [a court may] order measures no greater than necessary to cure the prejudice"
- This provision comes into play ***only*** if the lost ESI cannot be replaced or duplicated through additional discovery

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Amendment to Rule 37(e) #2: Key Points

- A court must find prejudice, but the rule doesn't say who has the burden of showing it
- The rule is not specific about what measures may be taken, but they must be tailored to offset the prejudice caused by the ESI loss
  - Striking pleadings
  - Precluding evidence about a claim or defense
  - Precluding specific evidence

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Amendment to Rule 37(e) #3: Intentional Loss of ESI

"[O]nly upon finding that the party acted with the intent to deprive another party of the information's use in the litigation[, a court may]:

(A) presume the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment."

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Amendment to Rule 37(e) #3: Key Points

- Most severe sanctions reserved only for those cases in which the loss of ESI was intentional
  - The rule overturns the decisions that have allowed the adverse inference instruction where the loss of ESI resulted from negligence
- If intentional conduct is found, the court does not need to find that the loss caused prejudice

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Abrogation of Rule 84 Overview

- Formerly, Rule 84 contained a variety of approved forms, including forms for:
  - A variety of complaints and answers
  - Summons
  - Waiver of Service of Summon
  - Judgment
  - Notices

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Abrogation of Rule 84 Overview, cont.

- The December 2015 amendments deleted the rule because:
  - The form complaints didn't comply with *Twombly*
  - It would be too hard to draft *Twombly*-compliant form complaints
  - Nobody uses the forms anyway
  - Suitable forms can be found in other sources

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Abrogation of Rule 84 Overview, cont.

- The only form the Civil Rules Advisory Committee liked was Form 5, "Notice of a Lawsuit and Request to Waive Service of a Summons"
- Under the amendments, the text of the form is tacked on to the end of Rule 4

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Amendment to Rule 55 (Default)

- Formerly, Rule 55(c) said that a court "may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)."
- That language was ambiguous—if one defendant is defaulted in a multi-defendant case, what is the standard for setting aside the default—"good cause" or the requirements of Rule 60(b)?

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Amendment to Rule 55 (Default), cont.

- Rule 54(b) suggested that Rule 60(b) should not apply because there is no "final" judgment:
  - Under the rule, a judgment is not final unless the court directs the entry of final judgment; and
  - The rule also says that the "judgment" "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties rights and liabilities."

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Amendment to Rule 55 (Default), cont.

- But some courts held that because the word "final" does not modify the words "default judgment" in Rule 55(c), Rule 60(b) should apply even if the judgment is not yet final.
- To correct that, the amendment to Rule 55(c) inserts the word "final" before the words "default judgment"

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Proposed Rule Changes Scheduled in December 2016

- No changes are proposed in the Federal Rules of Evidence
- But two amendments are proposed in the Federal Rules of Civil Procedure
  - First circulated in August 2014
  - The Advisory Committee recommended their adoption last May and the Federal Judicial Conference approved them last September
  - If the Supreme Court approves them this March, they will go into effect in December 2016 unless Congress vetoes them

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Proposed Amendment to Rule 6(d) (Mailing Rule)

- Currently, Rule 6(d) gives a party three additional days to respond to a motion or other served paper if it was served electronically
- Adopted in 2001 as part of the rule authorizing electronic service in some circumstances
  - Additional time justified because electronic service sometimes delayed or failed
  - Also adopted to encourage use of electronic service

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Proposed Amendment to Rule 6(d) (Mailing Rule), cont.

- Proposed amendment would eliminate the three additional days for a response
- Why?
  - Less concern about reliability
  - Lawyers less likely to refuse to consent because of reliability concerns
  - Complicates the computation of response times

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Proposed Amendment to Rule 4(m) (120-day limit)

- Rule 4(h)(2) provides for service of foreign corporations that cannot be served in the U.S.
- Rule 4(m) says that a summons must be served within 120 days after issuance, but also says that this rule does not apply to service of individuals overseas under Rule 4(f)
- Rule 4(m), however, doesn't mention foreign corporations—does the 120-day deadline apply?

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Proposed Amendment to Rule 4(m) (120-day limit), cont.

- The deadline should not apply—whether the defendant is an individual or a foreign corporation, it generally takes longer than 90-120 days to effect service overseas
- The proposed amendment would explicitly exempt Rule 4(h)(2) service of foreign corporations from the 120-day deadline

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Proposed Rule Changes Scheduled in December 2017

- No changes are proposed in the Federal Rules of Civil Procedure
- But three amendments are proposed in the Federal Rules of Evidence
  - First circulated for comment in August 2015
  - Advisory Committee recommendations in May 2016, and possible Supreme Court approval by March 2017
  - Won't go into effect any earlier than December 2017

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Proposed Abrogation of Fed. R. Evid. 803(16)

- Rule 803(16) contains the "ancient document" exception to the hearsay rule
- If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents
- The Evidence Rules Advisory Committee proposes abrogating the rule

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Proposed Abrogation of Fed. R. Evid. 803(16), cont.

- Why?
  - It is unnecessary—if reliable, a document may be admitted under Rule 803(6) (business records) or 807 (residual hearsay exception)
  - Exception problematic where no statute of limitation (sexual abuse, conspiracy)
  - Many forms of ESI are or about to become more than 20 years old—automatically admissible without a showing of reliability?

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Proposed New Rules Fed. R. Evid. 902(13) & (14)

- Rules 902(11) & (12) permit domestic business records and certain foreign records to be authenticated by a certificate of a custodian or other qualified person, without the need for a sponsoring witness
- Advance notice is required to give an adverse party the opportunity to object, and the record and certificate must be made available for inspection

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Proposed New Rules
Fed. R. Evid. 902(13) & (14), cont.

- But these rules do not apply to electronic records and data
- No reason to treat such records and data differently
  - Parties frequently stipulate to authenticity anyway
  - So long as advance notice is required, a certificate does as well as a live witness

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Proposed New Rules
Fed. R. Evid. 902(13) & (14), cont.

- Proposed Rule 902(13)
  - An electronic record is self-authenticating if the "electronic process or system . . . produces an accurate result"
  - Must be shown by a certificate by a "qualified person" that satisfies the certification requirements in Rule 902(11) or (12)
  - The proponent must meet the notice requirements of Rule 902(11), i.e., reasonable advance notice and making the record and certificate available for inspection

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Proposed New Rules
Fed. R. Evid. 902(13) & (14), cont.

- Proposed Rule 902(14)
  - Data copied from an electronic device, storage media, or electronic file is self-authenticating "if authenticated by a process of digital identification" (i.e., identical "hash values")
  - Must be shown by a certificate by a "qualified person" that satisfies the certification requirements in Rule 902(11) or (12)
  - The proponent must meet the notice requirements of Rule 902(11), i.e., reasonable advance notice and making the data and certificate available for inspection

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The End

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